

NAIDHANH

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNITED STATES OF AMERICA, New York, N.Y.  
5 v. 23 Cr. 490 (SHS)

6 WAEL HANA,  
7  
8 Defendant.  
9 -----x  
10  
11 Before:  
12 HON. SIDNEY H. STEIN,  
13 U.S. District Judge  
14  
15 APPEARANCES  
16 DAMIAN WILLIAMS  
17 United States Attorney for the  
18 Southern District of New York  
19 BY: PAUL M. MONTELEONI  
ELI J. MARK  
DANIEL C. RICHENTHAL  
Assistant United States Attorneys  
20 GIBBONS, P.C.  
21 Attorneys for Defendant Wael Hana  
BY: LAWRENCE S. LUSTBERG  
ANNE M. COLLART  
RICARDO SOLANO, JR.  
22  
23 ALSO PRESENT: Tracee Mergen, Special Agent (FBI)  
Ryan Larkin, Special Agent (FBI)  
24  
25

NAIDHANH

1 (Case called)

2 THE COURT: All right. Mr. Hana, I'm going to be  
3 asking you a series of questions for the next, oh, half hour or  
4 so. Let's start by having you tell me your full name.

5 THE DEFENDANT: Wael Hana.

6 THE COURT: Mr. Hana, do you speak and understand  
7 English fluently?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Is English your native language, sir?

10 THE DEFENDANT: The first language is Arabic. The  
11 second is English, yes.12 THE COURT: Do you consider yourself fluent in  
13 English?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Do you conduct your normal business  
16 affairs in English?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: If you wish, sir, you have a right to have  
19 an interpreter here in Arabic, or any other language you want,  
20 both today or in any other proceeding in this matter.

21 Do you understand that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Do you want an interpreter here?

24 THE DEFENDANT: Thank you. No, thank you, your Honor.

25 THE COURT: How old are you, sir?

NAIDHANH

1 THE DEFENDANT: Forty years old.

2 THE COURT: What is the highest level of education  
3 you've obtained?

4 THE DEFENDANT: I have a Bachelor's Degree of Social  
5 Work from Egypt.

6 THE COURT: All right. That's the equivalent of a  
7 college graduation here --

8 THE DEFENDANT: Yes, sir.

9 THE COURT: -- a B.S. or a B.A.?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: All right. Thank you.

12 Was all of your education up to that point in Egypt?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: In the past 24 hours, Mr. Hana, have you  
15 taken any pills, medicine, or drugs of any kind?

16 THE DEFENDANT: No, your Honor.

17 THE COURT: In the past 24 hours, have you taken any  
18 alcoholic beverages?

19 THE DEFENDANT: I had a glass of wine with dinner last  
20 night.

21 THE COURT: All right. Did that affect your  
22 cognition, your ability to think or to process information  
23 today?

24 THE DEFENDANT: No, your Honor.

25 THE COURT: In other words, are you feeling any

NAIDHANH

1 effects of that single glass of wine last night?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: All right. Not surprised.

4 Have you ever been treated or hospitalized for any  
5 mental illness, sir, or any alcohol or substance abuse?

6 THE DEFENDANT: No, your Honor.

7 THE COURT: Are you now or have you recently been  
8 under the care of a doctor or a psychiatrist?

9 THE DEFENDANT: No, your Honor.

10 THE COURT: Do you feel alert, awake, and clear headed  
11 today as you stand here before me?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Now, Mr. Lustberg, do you have any doubt  
14 as to Mr. Hana's competence to proceed today with the Curcio  
15 hearing?

16 MR. LUSTBERG: No, your Honor. None at all.

17 THE COURT: Ms. Collart?

18 MS. COLLART: No, your Honor. I do not.

19 THE COURT: I see we now have Mr. Solano.

20 Do you have any doubt as to Mr. Hana's competence to  
21 proceed today?

22 MR. SOLANO: No, your Honor.

23 THE COURT: All right. I hereby find that Mr. Hana is  
24 competent to proceed today.

25 Mr. Hana, when I refer to your attorneys, I'm going to

NAIDHANH

1 refer to Mr. Lustberg and Ms. Collart and Mr. Solano.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Indeed, if there are other attorneys that  
5 you work with in the Gibbons law firm, I am including them as  
6 well.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Okay. Do you understand, sir, that you've  
10 been charged with serious federal felonies in the superseding  
11 indictment?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Do you understand that Count 1 of the  
14 superseding indictment charges you with conspiracy to commit  
15 bribery pursuant to 18 U.S.C. 371, and the maximum sentence of  
16 that count is a fine and/or imprisonment for up to five years?

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: The maximum penalty of Count 2 that  
20 charges you with conspiring to commit honest services fraud in  
21 violation of 18 U.S.C. 1349 is a fine and imprisonment for up  
22 to 20 years, or either or both.

23 Do you understand that?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: The maximum penalty of Count 4 that

NAIDHANH

1 charges you with conspiring -- conspiracy for a public official  
2 to act as a foreign agent pursuant to 18 U.S.C. 371 is a fine  
3 and/or imprisonment for up to five years.

4 Do you understand that?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Now, during my questioning this afternoon,  
7 sir, if at any time you don't understand anything I'm asking  
8 you, or, for that matter, if you don't understand anything I'm  
9 telling you, I want you to stop me, Mr. Hana. You can ask me  
10 anything you want. You can ask your attorneys anything you  
11 want at any time in this proceeding. My concern is to make  
12 certain that you understand what I'm asking you and you  
13 understand what I'm telling you.

14 Do you understand that, sir?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: All right. Are you currently represented  
17 here by Mr. Lustberg, and Ms. Collart, and Mr. Solano, and the  
18 law firm of Gibbons, PC?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Are you satisfied up to now with their  
21 representation of you?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Mr. Hana, the reason for this proceeding  
24 is an issue has arisen as to whether or not there's a conflict  
25 of interest or a potential conflict of interest with respect to

NAIDHANH

1 the representation of those individuals and their firm in  
2 continuing to represent you.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Now, my question is going to fall into  
6 basically two buckets, because there are two areas of potential  
7 conflict or actual conflict here. The first bucket arises from  
8 those lawyers' current representation of Mr. Daibes, because  
9 your codefendant is Mr. Daibes, but it appears, and it's true,  
10 that Mr. Lustberg and the Gibbons firm represents Mr. Daibes in  
11 what's alleged to be a related federal case in the District of  
12 New Jersey.

13 Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: The second bucket of questions I'm going  
16 to be asking you arises from Mr. Lustberg's potential personal  
17 knowledge of certain facts which may be relevant in this case.  
18 Each of those buckets raises separate issues about a potential  
19 conflict here.

20 Do you understand that?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: The purpose of this proceeding is for me  
23 to get a certain comfortable level, if it's true, that you  
24 understand what the nature of that potential conflict is. So  
25 I'm going to be asking you questions to probe that, and toward

NAIDHANH

1 the end of this colloquy, I'm going to ask you to be describing  
2 in your own words what you think the nature of that conflict  
3 is.

4 Do you understand that?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Okay. Now, I haven't made any conclusions  
7 regarding that potential conflict or actual conflict. In other  
8 words, I'm not making a determination that they do have such a  
9 conflict at this time. What's important is you have a right to  
10 conflict-free counsel. In fact, the 6th Amendment to the  
11 Constitution gives you the right to counsel in a criminal case,  
12 and that's been interpreted to mean effective counsel. That,  
13 in turn, has been interpreted to mean conflict-free counsel.  
14 In other words, counsel whose only obligation is to you, and  
15 not to anybody else. That's your right under the 6th  
16 Amendment.

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: It's up to you to decide whether or not,  
20 in light of the potential risks which we'll be going through  
21 posed by their serving as your counsel, you wish to continue  
22 with them as your lawyers, or whether you want to find other  
23 lawyers, because you're always free to find other lawyers.

24 Now, you may remember the last time we were here I  
25 said to everybody, except Mr. Menendez, who was not present,

NAIDHANH

1 that -- I was alerting you that if for any reason at any point  
2 here you want new counsel, you should do that far enough in  
3 advance that new counsel coming in won't lead to an adjournment  
4 of the trial date, because new counsel is not going to be a  
5 reason for my pushing the trial date out. But that's another  
6 issue.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Okay. So I'm saying if you do want new  
10 counsel at any point, do it far enough in advance of the trial  
11 that new counsel can come on and effectively represent you by  
12 the trial date.

13 As I said, the purpose here is to describe to you what  
14 the possible conflict is, and to make sure you understand the  
15 risks in that potential conflict, and then for you to determine  
16 whether or not you want to waive the potential conflict and go  
17 forward with Mr. Lustberg, and Ms. Collart, and Gibbons PC as  
18 your lawyers.

19 Do you understand the purpose of the colloquy here?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Okay. Now, at any point, sir, you have  
22 the ability, I'm giving you the ability to ask to speak to  
23 another lawyer who does not have this potential conflict or  
24 actual conflict. In other words, somebody who has absolutely  
25 no connection with Mr. Daibes and that related -- allegedly

NAIDHANH

1 related New Jersey case. I'll appoint that person free of  
2 charge to talk to you, so you can get independent counsel, and  
3 I'll do that at any point in this proceeding. Indeed, at the  
4 end, I'll will ask you, and your lawyer will remind me if I  
5 fail to ask you, whether you want another counsel to come in.  
6 But that's your right.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: I'd appoint that person free of charge as  
10 well. As I said, I'm prepared to appoint somebody else, but  
11 you also have the right to retain another lawyer to talk to  
12 you, another independent lawyer if you so wish.

13 Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: You can stop me at any time you want to be  
16 able to consider this or to take a break or talk to another  
17 lawyer. We can pick it up at another time.

18 Do you understand that?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: All right. Let me now proceed to talk  
21 about the potential risks in proceeding with Mr. Lustberg,  
22 Ms. Collart, Mr. Solano, and Gibbons, PC.

23 Now, as I've told you, under the Sixth Amendment to  
24 the Constitution, an attorney who represents somebody in a  
25 criminal case has an obligation to represent their client to

NAIDHANH

1 the best of his or her ability. That lawyer has a duty of  
2 loyalty, that's 100 percent loyalty to the client, and not to  
3 anybody else.

4 Do you understand that?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: There's that duty of loyalty regardless of  
7 who's paying the bills for the representation.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Now, in addition to the duty of 100  
11 percent loyalty that a lawyer has to a client, an attorney also  
12 has the duty of confidentiality. I imagine you've discussed  
13 that with your attorneys already. Anything you tell your  
14 attorneys, as long as it's done in the context of their  
15 representation of you, and in the context of you seeking legal  
16 advice, or, for that matter, their rendering legal advice to  
17 you, all of that is confidential.

18 Do you understand that?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: Your attorneys are not permitted, under  
21 the rules of ethics, to tell anyone about your conversations  
22 with them, insofar as it goes to your seeking legal advice or  
23 their giving legal advice, and they can't use anything they've  
24 learned through your representation, through their  
25 representation of you, in any way without your consent, except

NAIDHANH

1 in very limited circumstances, which, to my knowledge, are not  
2 applicable here.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: So they can't say anything to anybody  
6 about what you're talking about. That's attorney-client  
7 confidentiality.

8 So, Mr. Lustberg, and Ms. Collart, and Mr. Solano have  
9 a duty of 100 percent loyalty to you and only you, and a duty  
10 of confidentiality that arises out of their representation.

11 Do you understand that?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Now, it so happens that Mr. Lustberg and  
14 Ms. Collart have formed a -- previously formed an  
15 attorney-client relationship with one of your codefendants  
16 here, Mr. Daibes, in connection with a federal criminal matter  
17 that is currently pending in the District of New Jersey.

18 Are you aware of that?

19 THE DEFENDANT: Yes, your Honor.

20 THE COURT: That is alleged to have a relationship to  
21 this case.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Now, that case is proceeding, as I  
25 understand from news reports, that Mr. Daibes, at some point,

156 NAIDHANH

1 plead guilty to one or more of the charges against him; but  
2 recently he withdrew his plea of guilty, and that case is going  
3 to proceed against Mr. Daibes.

4 Do you understand that?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: It arises out of allegedly fraudulent bank  
7 loan applications.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Now, are you aware that the government has  
11 alleged that that case is related to this case?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: I'm not taking a position on that, or any  
14 other allegation here, but I want to ensure that you understand  
15 that they are alleged to be related.

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Now, here, the superseding indictment  
19 alleges that you and Mr. Daibes, along with others,  
20 participated in a conspiracy in which Robert Menendez received  
21 bribes, including through his wife -- they're both your  
22 codefendants -- in exchange for, among other things, promising  
23 and seeking to interfere with Mr. Daibes' pending federal  
24 criminal case in the District of New Jersey.

25 Are you aware of that allegation here?

NAIDHANH

1                   THE DEFENDANT: Yes, your Honor.

2                   THE COURT: You told me earlier that you have reviewed  
3 the superseding indictment, and you discussed it with your  
4 attorneys, correct?

5                   THE DEFENDANT: Yes, your Honor.

6                   THE COURT: So you saw in that indictment how the  
7 government, in part, alleges that this case is related to that  
8 case; is that correct?

9                   THE DEFENDANT: Yes, your Honor.

10                  THE COURT: Now, without telling me what they've said,  
11 have Mr. Lustberg and Ms. Collart discussed this allegation and  
12 the potential conflict of interest that it and the fact that  
13 they represent Mr. Daibes in that New Jersey Federal District  
14 Court case poses with you?

15                  THE DEFENDANT: Yes, they did, your Honor.

16                  THE COURT: Did they answer any questions you may have  
17 had about that?

18                  THE DEFENDANT: Yes.

19                  THE COURT: Did they explain to your satisfaction the  
20 nature of the potential conflict?

21                  THE DEFENDANT: Yes, your Honor.

22                  THE COURT: All right. Now, what I want to stress to  
23 you is because Mr. Daibes is a client of Mr. Lustberg and Ms.  
24 Collart, and presumably Mr. Solano, and anybody else in the  
25 Gibbons law firm, in that New Jersey case, they have a duty of

NAIDHANH

1 100 percent loyalty, and a duty of confidentiality to  
2 Mr. Daibes.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Now, it's possible that their duty of  
6 loyalty to Mr. Daibes may conflict with their duty of loyalty  
7 to you in this case.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: In particular, if they learn something  
11 confidential in their representation of Mr. Daibes in the New  
12 Jersey matter that might be helpful to you, they may not be  
13 able to use it to help you unless Mr. Daibes consents, because,  
14 as I've told you, anything they learn in the course of that  
15 representation of Daibes they can't tell anybody. So even  
16 though Daibes may -- and I'm making this up. I don't know what  
17 the conversations are. I don't want to know what the  
18 conversations are. But if they've learned something that can  
19 help you in the course of their representation of Mr. Daibes,  
20 they may not be able to use that in representing you here  
21 unless Mr. Daibes authorizes them to release that information.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: So that may hinder their representation of  
25 you here.

NAIDHANH

1                   Do you understand that?

2                   THE DEFENDANT: Yes, your Honor.

3                   THE COURT: That's true even if it wouldn't harm  
4 Mr. Daibes. In other words, if Mr. Daibes has told them  
5 something that helps you, but doesn't hurt him, they can't take  
6 the position of, oh, we're not harming our client, Mr. Daibes,  
7 so we're going to disclose it to Mr. Hana, and use it in  
8 connection with the trial in this case, the Southern District  
9 of New York case. They can't do that, because it doesn't  
10 matter whether or not it helps or hurts Mr. Daibes. They can't  
11 use it in any way without the consent of Mr. Daibes.

12                  Do you understand that?

13                  THE DEFENDANT: Yes, your Honor.

14                  THE COURT: Do you see how that could hinder them in  
15 their representation of you here?

16                  THE DEFENDANT: Yes, your Honor.

17                  THE COURT: That may go to cross-examination at trial.  
18 For example, Mr. Daibes, if he testifies again, I have no idea  
19 what's going to happen at trial or who the defendants are going  
20 to be within the five defendants here, but there's -- I need to  
21 tell you about some of the possibilities.

22                  Do you understand that?

23                  THE DEFENDANT: Yes, your Honor.

24                  THE COURT: That potential conflict extends not only  
25 to questioning witnesses. It also extends to any arguments

NAIDHANH

1 they can make to me or to the jury.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Now, let me flip it. You see what I'm  
5 doing? I'm coming up with some of the possibilities where this  
6 potential conflict may manifest itself, and I assure you I  
7 can't come up with every possibility. I just don't know how  
8 the case is going to evolve, or what Mr. Daibes and these  
9 lawyers are going to be talking about, or what's relevant.  
10 These are hypotheticals. I'm doing my best to give you a range  
11 of possibilities here, so you'll get a sense of what this  
12 potential conflict looks like.

13 Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: So I gave you the example of their  
16 learning something from Mr. Daibes that helps you, and they  
17 can't use it, because they have a duty of confidentiality to  
18 Mr. Daibes. Now I'm going to flip it as a hypothetical. Let's  
19 assume they learn something from Mr. Daibes that inculpates  
20 Mr. Daibes. In other words, it's against Mr. Daibes, and,  
21 indeed, when they're talking with him, because he's their  
22 client in the New Jersey case, he may indeed say things that  
23 inculpate him.

24 Do you know what I mean when I say inculpate him?  
25 That they incriminate him. Do you understand that?

NAIDHANH

1                   THE DEFENDANT: Yes, sir.

2                   THE COURT: They may realize that, wow, here's  
3 something that I could use to Mr. Hana's advantage in the  
4 Southern District case, either in negotiating with the U.S.  
5 Attorney, or maybe even cross-examining Mr. Daibes, if  
6 Mr. Daibes takes the stand here, but I can't use it. I wish I  
7 could use it to help Mr. Hana, and cross-examine Mr. Daibes  
8 about this wrongdoing that he told them about; but Mr. Lustberg  
9 is going to be hampered. He can't do that because of the duty  
10 of confidentiality to Mr. Daibes.

11                  Do you understand that?

12                  THE DEFENDANT: Yes, your Honor.

13                  THE COURT: This potential conflict arises not only in  
14 pretrial discussions in regard to whether or not you should  
15 cooperate with the government, for example, or during trial in  
16 regard to questioning witnesses or making arguments to me, but  
17 it also applies at sentencing, because if sentencing is  
18 relevant here, and of course I'm not saying that it is, but if  
19 it does become a sentencing, it's possible that the government  
20 may seek your cooperation in giving information against other  
21 defendants, but Mr. Lustberg may be hindered in arguing -- in  
22 giving you information that could be used by him or by you to  
23 cooperate against Mr. Daibes, again, because of that duty of  
24 loyalty and confidentiality to Daibes that they have.

25                  Do you understand?

NAIDHANH

1                   THE DEFENDANT: Yes, your Honor.

2                   THE COURT: That's the essence of the potential  
3 conflict.

4                   Your attorneys here cannot do something to help you in  
5 this case to the extent they would otherwise be obligated to if  
6 doing so conflicted with their duty of loyalty or duty of  
7 confidentiality to Mr. Daibes.

8                   Do you understand?

9                   THE DEFENDANT: Yes, your Honor.

10                  THE COURT: Now, in addition, your attorneys here,  
11 that is, Mr. Lustberg, Ms. Collart, and Mr. Solano, might,  
12 because they have these duties to Mr. Daibes, be limited in  
13 what advice they could give you. For example, they might  
14 otherwise recommend that you cooperate, testify, or take other  
15 action in defending this case, but, again, it's something that  
16 might hurt Mr. Daibes, which means that their duty to you and  
17 their duty to him may conflict.

18                  Again, do you see, I'm just running changes on all the  
19 possibilities here? Do you understand what I'm telling you,  
20 sir?

21                  THE DEFENDANT: Yes, your Honor.

22                  THE COURT: Now, it's true even if they end their  
23 relationship as attorneys to Mr. Daibes, because the duties of  
24 confidentiality and loyalty continues even after the end of the  
25 attorney-client relationship.

NAIDHANH

1                   Do you understand that?

2                   THE DEFENDANT: Yes, your Honor.

3                   THE COURT: That's also true if the New Jersey case  
4 terminates and this case continues on. So if their  
5 relationship with Mr. Daibes ends, or that case ends, the duty  
6 of loyalty and confidentiality to Mr. Daibes still continues  
7 and they still have to honor it.

8                   Do you understand that?

9                   THE DEFENDANT: Yes, your Honor.

10                  THE COURT: Now, all of this can possibly affect the  
11 way in which your attorneys represent you here, including  
12 advice they give you, actions they undertake on your behalf,  
13 and arguments they make either to me in legal arguments, or to  
14 the jury in -- regarding any of the facts in this case.

15                  Do you understand that?

16                  THE DEFENDANT: Yes, your Honor.

17                  THE COURT: Do you understand that this potential  
18 conflict has existed throughout Mr. Lustberg's and  
19 Ms. Collart's representation of you?

20                  THE DEFENDANT: Yes, your Honor.

21                  THE COURT: It continues now, and it will continue  
22 even after their representation of Mr. Daibes ends.

23                  Do you understand that?

24                  THE DEFENDANT: Yes, your Honor.

25                  THE COURT: They had that potential conflict even

NAIDHANH

1 before the indictment came down in this case.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Okay. Now, as I said, I can't think of  
5 everything that would come up here, but I can give you  
6 examples. I'm going to give you a few more. It may be that  
7 Mr. Daibes has told Mr. Lustberg confidential information in  
8 connection with the other case that they can use to make  
9 arguments before me in order to help you. I've already done  
10 that I think as one of the possibilities here. But if  
11 Mr. Daibes won't give his consent, they can't use that  
12 information to assist you. Again, I think I've given that  
13 example, but I want to make sure you understand it, because it  
14 hinders or may hinder their representation of you.

15 Do you understand that?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: It's possible that Mr. Daibes could be a  
18 witness against you at trial or in other proceedings, and if  
19 Mr. Daibes does testify, you have the right to cross-examine  
20 him through your lawyers. In other words, hypothetically, if  
21 Mr. Daibes testifies against you here, Mr. Lustberg would have  
22 the right to cross-examine him, but, again, they're hindered  
23 because of this potential conflict. They can't use any  
24 confidential information they learned from Daibes to  
25 cross-examine him, even if it helps you, even if it helps you a

NAIDHANH

1 great deal.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Indeed, it may be that there might be a  
5 different witness or witnesses who Mr. Lustberg would want to  
6 call in your defense, but unless Mr. Daibes were to consent,  
7 Mr. Lustberg could not use any confidential information that he  
8 learned from his representation of Daibes to question that  
9 witness or other witnesses.

10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: In general, sir, the duty of loyalty and  
13 the duty of confidentiality that your attorneys have to  
14 Mr. Daibes could result in them questioning witnesses less  
15 vigorously or less effectively than an attorney who didn't have  
16 this potential conflict would have.

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Your attorneys may also refrain from or be  
20 limited in their ability to make certain arguments to me or to  
21 the jury should the case go to trial, or in another proceeding  
22 regarding evidence, even though arguments may be beneficial to  
23 you, because of the duties to Mr. Daibes that they have.

24 Do you understand that?

25 THE DEFENDANT: Yes, your Honor.

NAIDHANH

1                   THE COURT: Do you understand that no one can predict  
2 with any certainty the course that this case will take, or how  
3 the restrictions on your attorneys' ability to represent you  
4 will actually play out in the course of the Southern District  
5 case.

6                   Do you understand that?

7                   THE DEFENDANT: Yes, your Honor.

8                   THE COURT: Now, as I've told you before, sir, I'm  
9 fully prepared to appoint another independent attorney. That  
10 is -- I shouldn't say it that way. I'm fully prepared to  
11 appoint an attorney who's independent at no charge to you for  
12 you to discuss this issue with that attorney.

13                  Do you wish me to appoint another attorney on your  
14 behalf so you can discuss this issue?

15                  THE DEFENDANT: No, thank you.

16                  THE COURT: All right. Now, I told you when we first  
17 began, and what I've been dealing with here is that first  
18 bucket of information, the potential conflict arising out of  
19 their representation of Mr. Daibes. So I told you I was going  
20 to ask you for you to tell me in your own words what the nature  
21 of this potential conflict is, sir.

22                  Could you tell me how you understand the conflict,  
23 sir? I should say the potential conflict, sir.

24                  THE DEFENDANT: Well, I understand Mr. Lustberg and  
25 Ms. Anne, they represent Mr. Daibes in another matter, and

NAIDHANH

1 represent me in this matter, and there could be a conflict.  
2 And the Court wants to make sure there's no conflict there.

3 THE COURT: What is that conflict? Can you tell me  
4 what that conflict is?

5 THE DEFENDANT: Because they represent him in the New  
6 Jersey matter, and they represent me in this matter, and there  
7 could be a potential witness, there could be other --

8 THE COURT: And that they would be hindered in  
9 representing you to the best of their ability because  
10 information -- they may not be able to use information he's  
11 given them.

12 Do you understand that?

13 THE DEFENDANT: Attorney privilege or confidentiality.  
14 Yes, I understand, your Honor.

15 THE COURT: All right. Thank you.

16 Now, if you decide at the end of this proceeding that  
17 you do want Mr. Lustberg and Ms. Collart to continue to  
18 represent you, you're going to be prohibited from arguing in  
19 the future that they gave you ineffective assistance of counsel  
20 because of this potential conflict.

21 Do you understand that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: You can't argue in the future that they  
24 did not do a sufficient job defending you in light of the  
25 potential conflict.

NAIDHANH

1                   Do you understand that?

2                   THE DEFENDANT: Yes, your Honor.

3                   THE COURT: Is there anything I've said or anything  
4 I've raised in this first bucket that you want to have  
5 explained to you better, that you want me to explain anything  
6 better?

7                   THE DEFENDANT: No, your Honor.

8                   THE COURT: Do you want to talk to your attorneys  
9 about it?

10                  THE DEFENDANT: No, thank you.

11                  THE COURT: So let me ask you this: In light of this  
12 first bucket, do you wish to have Mr. Lustberg and Ms. Collart  
13 and Gibbons, PC, continue to represent you in connection with  
14 the charges against you here?

15                  THE DEFENDANT: Yes, your Honor.

16                  THE COURT: Do you want to speak to another counsel  
17 about this issue?

18                  THE DEFENDANT: No, your Honor.

19                  THE COURT: Is that your own decision, sir?

20                  THE DEFENDANT: Yes, your Honor.

21                  THE COURT: Do you think you've had sufficient time to  
22 think about?

23                  THE DEFENDANT: Yes, your Honor.

24                  THE COURT: Have you received any threats, inducement,  
25 payment, or other promise --

NAIDHANH

1                   THE DEFENDANT: No.

2                   THE COURT: -- that may have influenced your decision  
3 on this issue?

4                   THE DEFENDANT: No, your Honor.

5                   THE COURT: All right. I'm comfortable, sir, that you  
6 understand the nature of the conflict and -- the potential  
7 conflict and you're waiving it, and in regard to this first  
8 bucket, you wish to continue with your attorneys.

9                   Let me go to the second bucket here, and it's another  
10 potential issue here. Mr. Lustberg, apparently, has personal  
11 knowledge of certain facts alleged to be relevant to the  
12 charges here that arise from his representation of Mr. Daibes.

13                  Do you understand that?

14                  THE DEFENDANT: Yes, your Honor.

15                  THE COURT: Has he discussed that with you?

16                  THE DEFENDANT: Yes, your Honor.

17                  THE COURT: Okay. Now, I'll give you one example from  
18 the indictment, but this point is not limited to this one  
19 example. The point here is that he has knowledge of things  
20 that are relevant in this case, because of his representation  
21 of Daibes.

22                  Do you understand that?

23                  THE DEFENDANT: Yes, your Honor.

24                  THE COURT: Okay. So in paragraph 52(c) of the  
25 superseding indictment it says, on or about January 22, 2022,

NAIDHANH

1 Menendez and Daibes called Daibes' lawyer, that's Mr. Lustberg  
2 presumably, to complain that the lawyer had not been aggressive  
3 enough in attempting to get Daibes' case dismissed. That's an  
4 allegation here.

5 Now, it may be, I don't know, and we're a long way  
6 from trial, but it may be that at trial, that may be an issue,  
7 and it may be that the government is going to seek to induce  
8 Mr. Lustberg's knowledge about that conversation if it indeed  
9 took place.

10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: I take it it's true as well of  
13 Ms. Collart, I don't know what is the specific allegation here,  
14 but it is theoretically possible that she has knowledge of  
15 facts that are relevant here.

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: So either of them might be a potential  
19 witness on those facts.

20 Do you understand that?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Now, the fact that they are potential  
23 witnesses, and, again, I'm not -- I don't know that they're  
24 going to be witnesses, but the fact that they're potential  
25 witnesses presents a number of risks to you.

NAIDHANH

1                   Do you understand that?

2                   THE DEFENDANT: Yes, your Honor.

3                   THE COURT: Have you talked to them about this  
4 potential conflict?

5                   THE DEFENDANT: Yes, your Honor.

6                   THE COURT: Here, too, sir, if you wish, I'll appoint  
7 an independent lawyer to represent you, that you can talk with  
8 at no charge, so that you can ask him or her anything you want.

9                   Do you understand that?

10                  THE DEFENDANT: Yes, your Honor.

11                  THE COURT: Do you want me to appoint an independent  
12 lawyer?

13                  THE DEFENDANT: No.

14                  THE COURT: All right. Now, there are at least two  
15 risks that arise out of the fact that your lawyers may have  
16 individual or may have personal knowledge of facts that are  
17 relevant here. First, neither counsel nor anyone else from  
18 Gibbons can make arguments to me or the jury that are not  
19 consistent with their personal knowledge of the facts. In  
20 other words, lawyers cannot get up before me or the jury and  
21 argue facts that they know are not true.

22                  Do you understand that?

23                  THE DEFENDANT: Yes, your Honor.

24                  THE COURT: Now, if they've participated in relevant  
25 things here, so they have knowledge of particular facts at

NAIDHANH

1 issue here, personal knowledge, they can't make arguments to  
2 the contrary of those facts. So they're hindered in their  
3 representation -- possibly hindered in their representation to  
4 you because of that. If they didn't have knowledge of those  
5 facts, they'd be able to make whatever appropriate arguments  
6 they want. But if they do have knowledge of the facts, they're  
7 limited. They can't make arguments that are inconsistent with  
8 their personal knowledge of the facts.

9 Do you understand?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Indeed, as part of that line here, they  
12 can't question other witnesses in a manner suggesting that a  
13 fact that they personally know is true is, in fact, false.  
14 Same theory. I'm just switching it a little. Instead of their  
15 making arguments to the jury or to me that they know are not  
16 factually true, which they can't do, similarly, they can't  
17 question witnesses in a way that suggests that certain facts  
18 that they know are true are not true, or the reverse.

19 Do you understand that?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Okay. Now, there's a second risk to their  
22 having knowledge, possible knowledge of facts here, and that's  
23 that either may be called as a witness by the government if the  
24 government decides to call them as witnesses. Again, we're not  
25 at trial now. This trial is set for May. Nobody is being

NAIDHANH

1 asked for the witness lists. I don't know who the witnesses  
2 for the government are going to be. I don't know who the  
3 witnesses for the defense are going to be. But if the  
4 government were to call one or both of them as a witness,  
5 there's the possibility that whoever they call as a witness may  
6 have to withdraw, because a lawyer cannot be a witness and a  
7 lawyer at the same time.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: So it may be that they may voluntarily  
11 withdraw, or I may order their withdrawal if they're a witness  
12 and it's relevant to the case proceeding.

13 Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: A lawyer can't be both a lawyer and  
16 testify as a fact witness at the same time.

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Do you understand that, as I've said  
20 throughout this colloquy, this discussion, I can't predict how  
21 this is going to play out? I can't predict whether the  
22 government is going to call them as witnesses. I can't predict  
23 whether or not anything they do know out of their own knowledge  
24 is going to be relevant in this case. That decision will be  
25 made much closer to trial. As I told you earlier in this

NAIDHANH

1 discussion, you won't be able to adjourn the trial to get a new  
2 counsel if it's very close.

3 Do you understand that?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Now, the fact that either of them might be  
6 fact witnesses could potentially affect their advice to you,  
7 because they may prefer not to be a witness.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Similarly, if you prefer that they not be  
11 a witness, it could affect your ability to follow their advice  
12 or to make certain decisions.

13 Do you understand that?

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Now, even if Mr. Lustberg and Ms. Collart  
16 are not called as witnesses, it's possible that other witnesses  
17 may be aware that either of them was personally involved in or  
18 had knowledge of facts that are relevant here, and that may  
19 create challenges for them in cross-examining those witnesses.  
20 That wouldn't be an issue with a lawyer who had no knowledge of  
21 the facts -- no personal knowledge of the facts.

22 Do you understand that?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: So why don't you tell me now what you see  
25 is the potential or actual conflict in this second bucket, that

NAIDHANH

1 is, the fact that your lawyers may have personal knowledge of  
2 facts that are involved in this case.

3 What's the problem with that?

4 THE DEFENDANT: What I understand, if the government  
5 called Mr. Lustberg or Ms. Anne to be a witness, it could  
6 affect the ability of them -- of the trial.

7 THE COURT: Well, it could affect their ability to  
8 represent you fully.

9 THE DEFENDANT: Yes. Yes, your Honor.

10 THE COURT: I may have to require that they withdraw  
11 as your counsel.

12 Do you understand that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Do you understand that just with that  
15 first bucket, you won't be able to argue -- if you want them to  
16 continue as your lawyers, you're going to have that choice in a  
17 moment -- you have that choice throughout this. If you decide  
18 that you want them to continue, you won't be able to argue that  
19 they rendered ineffective assistance of counsel, because of  
20 this potential conflict, due to their potentially having  
21 knowledge, personal knowledge of the facts that are relevant  
22 here.

23 Do you understand that?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Is there anything I've been asking you

NAIDHANH

1 about this second bucket that you want explained -- that you  
2 want me to explain?

3 THE DEFENDANT: No, your Honor.

4 THE COURT: Anything you want your own lawyers to  
5 explain to you? Do you want to talk to them now?

6 THE DEFENDANT: No, your Honor.

7 THE COURT: So let me ask you, in light of this second  
8 bucket, do you wish to have Mr. Lustberg, Ms. Collart, and  
9 Gibbons continue to represent you in this case?

10 THE DEFENDANT: Yes, your Honor. Especially, they  
11 have my file since 2019, it's going to be very difficult for me  
12 to get somebody to understand. And since the last year and a  
13 half I got the documents from the subpoena, they've been  
14 producing all of the documents to the government. Yes, your  
15 Honor, I want them to represent me.

16 THE COURT: Okay. No, I understand that, but I don't  
17 want that fact -- I understand how you've been working with  
18 them for a long time, documents have gone back and forth, but I  
19 don't want that to be the deciding factor in whether you stay  
20 with them or not, because if you decide that you don't want  
21 them to be your lawyers, or later on if I say they can't be  
22 your lawyers, those document issues can be taken care of  
23 theoretically rather simply. They would have to turn all their  
24 files over to the new law firm, and they would have to assist  
25 the new law firm in representing you, getting you up to speed.

NAIDHANH

1 So I don't want that to be the deciding factor here.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Okay. Do you want them to continue here?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Is that your own decision?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Have you received any threat, inducement,  
9 payment, or other promise that may have influenced your  
10 decision here?

11 THE DEFENDANT: No, your Honor.

12 THE COURT: Do you want another lawyer to come in on  
13 this?

14 THE DEFENDANT: No, your Honor.

15 THE COURT: Do you understand you're waiving the right  
16 to have someone come in and talk to you about this?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: I do find that Mr. Hana understands the  
19 nature of the potential conflicts here, and he's waived the  
20 right to have separate counsel, and he wishes to proceed with  
21 Gibbons, PC, and Mr. Lustberg, and Ms. Collart.

22 Is there any additional questioning, Mr. Lustberg,  
23 that you wish me to undertake here?

24 MR. LUSTBERG: No, your Honor.

25 THE COURT: Government?

NAIDHANH

1                   MR. RICHENTHAL: Just two small things, your Honor. I  
2 don't know they require additional questions, but I defer to  
3 the Court.

4                   First, in talking about the potential conflict of  
5 either Mr. Lustberg or Ms. Collart being witnesses, the Court  
6 talked principally about in questioning witnesses or making  
7 arguments. It's also possible, I think this was in the  
8 proposed colloquy, that certain documents that may come into  
9 evidence. For example, toll records, might refer to  
10 Mr. Lustberg --

11                  THE COURT: Toll?

12                  MR. RICHENTHAL: Toll records, phone records, your  
13 Honor.

14                  THE COURT: Yes.

15                  MR. RICHENTHAL: Or other things might come into  
16 evidence that might refer to Mr. Lustberg or Ms. Collart or the  
17 firm. There are potentially ways around that, but I just want  
18 the flag and make sure the Court is comfortable Mr. Hana  
19 understands that there are also documents that could raise  
20 similar issues with respect to defense counsel's ability to  
21 make arguments on those documents, or the jury seeing them in  
22 those kinds of things.

23                  THE COURT: Did you say two things?

24                  MR. RICHENTHAL: Yes, your Honor.

25                  The second is -- and, again, I think this is implicit,

NAIDHANH

1 but I want to make sure it's sufficiently explicit, that  
2 Mr. Hana seems to have knowingly waived his rights today, but  
3 the Court, as I think you indicated, may need to revisit at  
4 least the second bucket later on in this proceeding, depending  
5 on how it goes. But if he's taking on the risk, that it's  
6 possible his counsel could have to withdraw, if you order, even  
7 if he's knowingly waiving these risks at this point.

8 THE COURT: Yes. I think except for the documents,  
9 everything was explicit, but I'll do it shortly.

10 What the government has asked me to point out to you,  
11 sir, is that in regard to what I've been calling the second  
12 bucket, that is, the fact that Mr. Lustberg or Ms. Collart may  
13 be fact witnesses, that may mean very late in the game I may  
14 have to order them to withdraw, which means that you would then  
15 have to obtain a new attorney.

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Okay. What Mr. Richenthal was also  
19 raising, and I probably should have been explicit in this,  
20 remember, I was going through a whole variety of possibilities  
21 here that related to your cross-examining witnesses, who to  
22 call, not to call. Everything I've been talking to you about  
23 applies not only to oral testimony, but to documents  
24 themselves.

25 In other words, for example, there may be documents

NAIDHANH

1 that involve things that are relevant. Again, toll records on  
2 calls, when they were made, to whom they were made, they may  
3 involve Mr. Lustberg and Ms. Collart. Again, the government  
4 said there are ways around that. There may be redactions that  
5 are possible, but it may not be true, and those may present --  
6 those may ripen into actual conflicts.

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: All right. Again, I find that this  
10 defendant has waived his right to conflict-free counsel, and  
11 wishes to proceed with his current lawyers.

12 Mr. Lustberg, anything? I think you said no.

13 MR. LUSTBERG: No, nothing further, your Honor. Thank  
14 you very much --

15 THE COURT: All right.

16 MR. LUSTBERG: -- for the thorough colloquy.

17 THE COURT: I thank everybody.

18 (Adjourned)

19

20

21

22

23

24

25